

Message

From: Barger, Cindy [Barger.Cindy@epa.gov]
Sent: 3/7/2023 9:12:54 PM
To: Hubner, Matt (he/him/his) [Hubner.Matt@epa.gov]
Subject: Re: NEPA POLICY COMPLIANCE ISSUE

Thanks Matt!

Sent from my iPhone

On Mar 7, 2023, at 4:07 PM, Hubner, Matt (he/him/his) <Hubner.Matt@epa.gov> wrote:

Hello Ms. Warren,

I did receive your email. Unfortunately, it arrived just as I was taking leave. As such, I have not been able to fully review and respond to your email. Please accept my apologies for the delay. I am concurrently reviewing correspondence from both you and Mr. Platts, and I hope to provide at least an initial response to you both by tomorrow afternoon.

I appreciate your patience and thank you for reaching out to me.

Sincerely,

Matt

Matt Hubner (he/him/his)
NEPA Branch
U.S. EPA, Region 8, 80RA-N
1595 Wynkoop Street
Denver, CO 80202-1129
p: (303) 312-6500 / f: (303) 312-7203

From: Cindy Warren [Ex. 6 Personal Privacy (PP)]
Sent: Tuesday, March 7, 2023 1:44 PM
To: Hubner, Matt (he/him/his) <Hubner.Matt@epa.gov>
Cc: McCoy, Melissa <mccoy.melissa@epa.gov>; Boeglin, Michael <Boeglin.Michael@epa.gov>; Barger, Cindy <Barger.Cindy@epa.gov>
Subject: Fw: NEPA POLICY COMPLIANCE ISSUE

Hello. I sent you the attached email on Feb 27 and wanted to confirm it reached you (I sometimes have problems sending emails with multiple attachments).

If the email was received and you've had time begin your review, I was wondering if you could provide me with a brief status update.

Thank you very much.

Regards,

Cindy Warren

From: Cindy Warren **Ex. 6 Personal Privacy (PP)**
Sent: Monday, February 27, 2023 9:00 AM
To: Hubner.Matt@epa.gov <Hubner.Matt@epa.gov>
Cc: mccoy.melissa@epa.gov <mccoy.melissa@epa.gov>; boeglin.michael@epa.gov <boeglin.michael@epa.gov>; barger.cindy@epa.gov <barger.cindy@epa.gov>
Subject: NEPA POLICY COMPLIANCE ISSUE

Dear Mr. Hubner,

Hello. I would like to share with you concerns neighbors and I have regarding the HUD application from the City of Boulder Division of Housing for a CDBG Section 108 loan of \$4,000,000 to fund construction of a modular housing factory. The factory will be built on Boulder Valley School District (BVSD) property at 6500 Arapahoe Road in Boulder, CO.

I know you have corresponded previously with Bill Platts regarding the factory; he said you were very helpful and recommended that I contact you.

The Project Name is 2021 Modular Production Factory.
The HEROS Number is 90000001019295.
The Project Location is 6500 Arapahoe Road, Boulder, CO 80303.
The application was submitted on 8/16/21.
A copy of the application is attached.

We believe there are many irregularities with the Environmental Assessment (E.A.) associated with the loan application. Additionally, there are multiple issues with the Environmental Certification of the application. I am unsure to whom I should address my concerns. For that reason, I am sending this email to multiple EPA divisions, including the Region 8 Division, the Wetland and Water Enforcement Division, and the NEPA Compliance Division. If I did not include the correct Division, please let me know whom I should notify.

Irregularities -

The most glaring irregularities involve the Fish and Wildlife Section 7 Consultation; specifically, the inclusion in the application of a Section 7 for a Longmont site (which is not the application site), and the omission of a Section 7 for the application site, which is in Boulder.

The actual project site is 6500 Arapahoe Road, Boulder, CO.

The site of the Section 7 Consultation in the application is 50 E Rogers Rd, Longmont, CO.

The identifying information for the Longmont project in the HUD document is as follows -
Consultation Code: 06E24000-2021-SLI-0579
Event Code: 06E24000-2021-E-01511
Project Name: St. Vrain Habitat 50 E Rogers Rd Longmont, CO

Project Type: Federal Grant / Loan Related

Project Description: St Vrain Habitat proposes to redevelop the land to construct owner occupied affordable housing.

Project Location:

Approximate location of the project can be viewed in Google Maps: <https://www.google.com/maps/@40.163587250000006,-105.09056417133044,14z>

Counties: Boulder

Additionally, throughout the report there are maps and aerial photos of both Longmont and Boulder.

For example, to the question "Are federally listed species or designated critical habitats present in the action area?" the City replies -

"No, the project will have No Effect due to the absence of federally listed species and designated critical habitat."

Compliance Determination

This project will have No Effect on listed species because there are no listed species or designated critical habitats in the action area. This project is in compliance with the Endangered Species Act.

Supporting documentation

USFWS Consultation 3 15 2021.pdf

NEPAssist Critical Habitat Map.JPG

Endangered Species Map.JPG

- the first item is the Longmont Section 7 Consultation (copy of first page attached)
- the second item is a NEPAssist Critical Habitat map of Longmont, showing 50 Rogers Road (copy attached)
- the third item is an Endangered Species basemap of Boulder

So, the supporting documentation references both sites.

A similar situation is noted in the Wetlands Protection section. To the question "Will the new construction or other ground disturbance impact an on- or off-site wetland?" The City replies - "No, a wetland will not be impacted in terms of E.O. 11990's definition of new construction."

Compliance Determination

The project will not impact on- or off-site wetlands. The project is in compliance with Executive Order 11990.

Supporting documentation

City of Boulder Wetlands Map.JPG

National Wetlands Inventory Map.JPG

- the first item is a City of Boulder eMapLink demonstrating wetlands

-the second map is a National Wetlands Inventory Map of 50 Rogers Road in Longmont (copy attached)

The supporting documentation again references both sites.

Also, in the Coastal Barrier Resources section of the application the City states -

"This project is located in a state that does not contain CBRA units. Therefore, this project is in compliance with the Coastal Barrier Resources Act."

Compliance Determination

This project is located in a state that does not contain CBRS units. Therefore, this project is in compliance with the Coastal Barrier Resources Act.

Supporting documentation

Coastal Barrier Resources System Map.JPG

This is a map of Longmont (copy attached)

And, in the Coastal Zone Management section of the application the City states -

This project is located in a state that does not participate in the Coastal Zone Management Program. Therefore, this project is in compliance with the Coastal Zone Management Act.

Compliance Determination

This project is located in a state that does not participate in the Coastal Zone Management Program. Therefore, this project is in compliance with the Coastal Zone Management Act.

Supporting documentation

Coastal Zone Boundary Map.JPG

This is a map of Longmont (copy attached)

Additionally, information in the Longmont Section 7 doesn't apply to the Boulder site. For instance, in the Wetland section it states " "THERE ARE NO WETLANDS WITHIN YOUR PROJECT AREA". However, Sombrero Marsh is adjacent to the Boulder project area, and the East Boulder Ditch runs through the project area; these are both wetlands listed on the National Wetlands Inventory (NWI).

Other problems with the inclusion of the Longmont Section 7 are that the Species Lists and the Migratory Birds section contain animals and plants that are native to the Longmont site, not the Boulder site. This difference would be especially marked for the migratory bird population, as Sombrero Marsh is an important spring and fall stopover for migrating birds along the Rocky Mountain Flyway, and there are many species of migratory birds which regularly visit the Marsh.

We do not know how or why the Longmont Section 7 document, and maps of the Longmont site, are in the HUD document for 6500 Arapahoe in Boulder. We are aware that Boulder Housing & Human Services was involved in both projects (see the attached email which references the Longmont site at 50 E. Rogers Road).

We are also concerned the City did not follow Executive Order 11990 (attached). The compliance section of EO 11990 specifies that the Environmental Review Record should contain documentation that supports one of the following -

- an exception or allowance for the project - this does not apply to the project
- the project does not involve new construction - the project is new construction
- a National Wetland Inventory (NWI) map or other relevant documentation indicates the project does not impact an on or off-site wetland - the NWI map in the document is for the Longmont site, there is no NWI map for the actual site in Boulder, and there is no documentation that indicates the wetlands won't be affected by the project (other than the City stating the wetlands won't be affected)
- an 8-Step Decision Making Process evaluation, including a map and the early and final public notices and wetland delineation report - this was not performed.

We believe an 8-step Decision Making Process evaluation (or an EIS) should have been performed.

Environmental Certification -

We feel there are also many issues with the Environmental Certification process of the application. Specifically, the Deputy Directory of Housing & Human Services certified on page 3 of the application packet that -

"The responsible entity has fully carried out its responsibilities for environmental review, decision-making and action pertaining to the project".

However, issues regarding the adequacy of the environmental review include -

-----No Section 7 Consultation was performed at 6500 Arapahoe.

-----The E.A. was not performed by a biologist or any subject matter experts (e.g. traffic, noise) as related to specific topics to be assessed. Title 24 CFR 58.5 Related Federal Laws and Authorities (i) HUD Environmental Standards (iv) states: "The responsible entity shall use current techniques by qualified professionals to undertake investigations determined necessary."

-----The E.A. consists largely of a checklist which was filled out by City of Boulder Housing and Human Services.

-----There is minimal supporting documentation for many of the answers in the E.A.

-----The E.A. states in the checklist "this project includes no activities that would require further evaluation under HUD's noise regulation. This project is in compliance with HUD's noise regulation."

However, the project is a large metal factory making houses, and it will not be soundproofed (unless plans have changed in the last few weeks). Noise will have significant impacts on wildlife. Additionally, the City can't tell us how loud the factory will be - how can they state the factory will be in compliance with HUD's noise regulation?

-----The E.A. states in the checklist "The project will not impact on- or **off site wetlands**."

As mentioned above, East Boulder Ditch runs in the project area, and Sombrero Marsh is adjacent to the project area; these are both listed on the NWI. However, these are not demonstrated on the NWI map within the HUD application, because that map demonstrates the Longmont site.

As pointed out in the County Planning document from 9/21 (attached), the factory impacts will include "visual impacts, light, noise, vibrations, fumes" - these will all affect wildlife. Additionally, the handling of surface runoff from the project area requires an underground water detention facility which will eventually release the water into the East Boulder Ditch (as mentioned, this ditch is on the NWI; it also has potential surface connections to South Boulder Creek, which is a WOTUS) - another impact. Finally, traffic routing is an issue. Significant amounts of construction and operational traffic (probably the vast majority of traffic) will run down 63rd Street; a portion of 63rd Street is within the project area and also within 10 feet of the border of Sombrero Marsh and also within the required 50-foot wetland buffer surrounding the Marsh. Construction traffic will be particularly heavy, consisting of literally thousands of trucks. The heavy traffic, along with the associated noise, dust, and emissions will have significant negative impacts on the wildlife at the Marsh. (see traffic in miscellaneous points below)

-----The E.A. states in the checklist "There are no disproportionately high and adverse impacts to low-income or minority populations from the proposed project." However, the previously mentioned traffic route of 63rd Street also abuts Columbine Mobile Home Park. The residents here are an underserved minority population and will be significantly affected by the very heavy traffic passing next to their mobile homes, as well as by the noise, dust and emissions associated with the traffic. There is also a potential danger to children, as children here sometimes play in the street. This traffic will disproportionately impact a disadvantaged population. (see traffic in miscellaneous points below)

-----The E.A. states in the checklist "The proposed project is compatible with surrounding land uses". This is not accurate. The project site is zoned Public. In the City of Boulder, manufacturing use is not allowed on Public zoned property. Additionally, the project area is less than 700 feet from two residential neighborhoods (Ridglea Hills neighborhood and the Reserve subdivision) and within 200 feet of Columbine Mobile Home Park. Although the City cites BVSD sovereignty as justification for bypassing City rules and regulations, this is highly controversial and of questionable legality. In fact, concerned citizens are suing the City regarding the arbitrary change in zoning laws for this particular site; that lawsuit is currently ongoing. We feel the proximity of residential neighborhoods to the factory, and the zoning issues, should have been disclosed in the HUD document.

-----The E.A. states in the checklist "No unique natural features are located at the project site." Sombrero Marsh is adjacent to the project area. Sombrero Marsh is a unique marsh, as it is a naturally formed saline wetland occurring in a non-coastal location. Inland saltwater marshes are relatively rare. The answer appears disingenuous because it narrowly focuses on the project site and ignores the adjacent project area.

-----The City did not follow the basic requirements of preparing an E.A. regarding evaluation of alternative sites (title 24 CRF 58.40). In the E.A. it was stated "The City of Boulder has been working collaboratively with Boulder Valley School District and Habitat for Humanity to develop the proposed project. The proposed project is the design that meets the collaborative needs of the community. Detailed alternative site plans have not been created." They then addressed the lack of alternative sites by stating "Under the no action alternative, the Section 108 loan would not be provided for the proposed project and the property would remain as a vacant parking lot. No affordable housing would be constructed to meet the needs of the community." They appear to be saying if we don't build the factory here, we can't build it anywhere. However, both the City and BVSD have sizable plots of land in close proximity to the proposed site, and the City owns a great deal of land in Boulder. If this site wasn't available, we believe the City could have found another site. We think alternative sites weren't meaningfully evaluated because the City and BVSD wanted to build the factory at this particular site.

"The responsible entity . . . will comply with . . . statutory obligations of the laws cited in 24 CFR 58.5".

-----Title 24 CFR 58.5 cites 24 CFR 55. In 55.2 (11) (ii) it states "As primary screening, HUD or the responsible entity shall verify whether the **project area** is located **in proximity to wetlands identified on the National Wetlands Inventory (NWI)**. If so, HUD or the responsible entity should make a reasonable attempt to consult with the Department of the Interior, Fish and Wildlife Service (FWS), for information concerning the location, boundaries, scale, and classification of wetlands within the area. If an NWI map indicates the presence of wetlands, FWS staff, if available, must find that no wetland is present in order for the action to proceed without further processing." Although East Boulder Ditch and Sombrero Marsh are both on the NWI, it wasn't until 2/8/23 that Fish and Wildlife became aware of the situation (through resident notification). Additionally, on 2/8/23 Fish and Wildlife requested that the City contact the Army Corps of Engineers and request they reach a determination regarding whether the streams/ditches in the project area are jurisdictional as tributaries to a traditionally navigable water body.

-----Title 24 CFR 58.5 also cites Executive Order 11990 regarding Wetlands Protection and Environmental Justice, which are addressed above.

"The responsible entity has disseminated and/or published in the manner prescribed by 24 CFR 58.43 and 58.55 a notice to the public in accordance with 24 CFR 58.70 and as evidenced by the attached copy (copies) or evidence of posting and mailing procedure".

-----58.43 addresses dissemination and/or publication of the FONSI. It specifically states "As a minimum, the responsible entity **must send the FONSI notice to individuals and groups known to be interested in the activities**". It goes on to say, "The responsible entity **may also** publish the FONSI notice in a newspaper of general circulation in the affected community." Certainly, common sense and sound judgement dictate that nearby residents would constitute individuals known to be of interest. However, no residents were notified by mail until after the FONSI was submitted and release of funds was requested (RROF). Specifically, although the FONSI was published in the local newspaper on 7/28/21 (this alone is insufficient notice for individuals of interest), no residents were informed of the project at that time. The deadline to dispute the FONSI was 8/15/21, and the application and RROF were submitted to HUD on 8/16/21; still no residents had been informed. The closest neighbors (those within 600 feet of the project site) were mailed regarding the project on 8/25/21 - more than a week after submission of the FONSI and the RROF. The 8/25/21 letter addressed primarily annexation and zoning with only a brief mention of the factory, and the recently published FONSI was not mentioned. Additionally, neighbors within 1,000 feet of the proposed factory site weren't mailed regarding the project until 9/22/22 (over a year after the FONSI was submitted). Of note, the HUD application includes no copies or evidence of mailings to neighbors, as none took place prior to submission of the application.

-----In addition to the requirements listed above in 58.43, 58.47 states that the FONSI must be made available for public comments for 30 days before the recipient files the RROF when there is considerable controversy concerning the project (this project is highly controversial) or when the project is unique and without precedent (building a factory adjacent to a high functioning Marsh designated by the County as a Critical Wildlife Habitat is a unique situation and allowing manufacturing in a public zone in Boulder is without precedent). The 30 days period obviously wasn't considered here, as residents weren't notified prior to submission of the FONSI and RROF.

Miscellaneous Points:

-----Regarding noise - The City has consistently stated that noise would not be an issue and they would be in compliance with HUD's noise regulation. However, in January 2023 (16

months after the HUD application was submitted), the City contacted acoustical engineers to evaluate the potential for noise impact. When I look up HUD's noise regulation I find - "It is a HUD goal that exterior noise levels do not exceed a day-night average sound level of 55 decibels. This level is recommended by the Environmental Protection Agency as a goal for outdoors in residential areas." Elsewhere I find that HUD states the day-night sound average should not exceed 65 decibels to be acceptable. When I look up 65 decibels (so using the higher number), I find that 65 decibels is an intensity similar to a business office or the noise inside a running car. It seems unlikely to me that a non-soundproofed metal factory building houses will not have noise levels that exceed 65 decibels.

-----Regarding the traffic route of 63rd Street - When recently questioned by HUD regarding traffic on 63rd Street, the City's Compliance and Project Manager wrote a response on 12/5/22 stating "The 63rd St access road runs in close proximity to a wetland. At the time of completing the environmental assessment, traffic was expected to occur on 65th St which is the closest access road to the site." However, the attached Modular Building Factory map, which is dated April 2021, shows the traffic route is 63rd Street. The HUD application was submitted August 16 2021, which is 4 months later. Additionally, BVSD has been adamantly opposed to the use of 65th Street as the traffic route, as they say it will negatively impact their operations. Thus, it's unclear what time period the Compliance Manager is referencing regarding plans to use 65th Street for factory traffic. In any event, if at one point the City considered using 65th Street, that appears to have been well before the application was submitted. Additionally, once the City knew their HUD application was in error regarding the traffic route, they were obligated to inform HUD of this change, particularly in view of the fact that using 63rd Street as the traffic route has significant negative effects for both the residents at Columbine Mobile Home Park and the wildlife at Sombrero Marsh. Residents have discussed these issues with both the Boulder City Council and BVSD at length via emails and at City Council meetings, but both entities have accepted the use of 63rd Street during hours of impact for BVSD (hours of impact are defined as 6 am - 6 pm). Additionally, the City has placed no limits on the amount of construction traffic that can use 63rd Street (as mentioned, this will constitute thousands of trucks). For operational traffic, the City will accept 100% of estimated operational traffic on 63rd (the City predicts 10 truckloads of deliveries to the factory per month and the City has stated that 10 deliveries per month is acceptable on 63rd Street).

-----Regarding the E.A. - No biologist evaluated the project area prior to submission of the HUD application. The City did obtain a natural resource assessment from ERO Consultants in Natural Resources and the Environment on 10/15/21 (2 months after submission of the HUD application) for another purpose. The ERO showed significant findings such as the presence of wetlands in the project area (in addition to the aforementioned East Boulder Ditch). They also noted that Sombrero Marsh "is located just south of the project area and is regulated under the City's wetland ordinance, which includes a 50-foot wetland buffer around the marsh. The regulated wetland buffer overlaps the southwestern portion of the project area." Of note, this is where traffic will be running on 63rd Street.

In summary, we believe the HUD application, at a minimum, appears deeply flawed. This email describes many of the problems concerning the EA, the Environmental Certification and the Finding Of No Significant Impact (FONSI). As documented above, we believe the issuance of a FONSI was based on inaccurate and incomplete data. Per policy and regulatory requirements, we feel the project area needs to be properly evaluated for any significant impacts on the quality of the human environment prior to the use of HUD funds. We ask that the EPA

consider, assess and investigate the issues described and take actions they deem appropriate. Time is of the essence as construction, and thus use of HUD CDBG funds, is scheduled to begin shortly.

I can provide more detailed information and documentation of these and other issues if that would be helpful.

I would be grateful if you could let me know your thoughts and provide me with updates.

Thank you very much for your consideration. We would greatly appreciate any help you can provide to safeguard Sombrero Marsh and wetlands.

Regards,

Cindy Warren, M.D.

1.